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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

NATIONAL CAREERS CORPORATION,

Plaintiff and Respondent,

v.

NANCY LEA SPEER,

Defendant and Appellant.

2d Civil No. B206421
(Super. Ct. No. 1243078)
(Santa Barbara County)

Nancy Lea Speer appeals from a judgment entered after the trial court awarded National Careers Corporation (NCC) \$42,969.80 plus interest for unearned commission advances on an open book account.¹ Appellant received the advances while employed at NCC and claims, among other things, that the judgment is subject to an offset for \$51,840 minimum wages. We affirm.

¹ Labor Code section 204.1 states in pertinent part: "Commission wages are compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof." Although section 204.1 refers to employees of licensed vehicle dealers, the statute's definition of "commission" is more generally applicable. (See *Ramirez v. Yosemite Water Co, Inc.* (1999) 20 Cal.4th 785, 803.)

Facts

NCC is an employment agency specializing in executive recruiting. In 2003, NCC hired appellant as an executive recruiter pursuant to an employment agreement in which NCC loaned appellant future commissions and, at the end of each month, deducted earned commissions from the advance draw. The employment agreement provided that appellant, upon termination, would repay NCC for advanced commissions in excess of commissions actually earned.

Appellant worked at NCC for 39 months, received \$271,824.97 in commission advances, and earned \$224,025.71 commissions plus \$4,829.46 bonuses, which resulted in a \$42,969.80 open book balance owed to NCC.

After NCC sold the business to Koosharem Corporation, dba SelectRemedy in November 2006, appellant signed a severance agreement. NCC sued to collect the \$42,969.80. The trial court rejected the defense claim that the severance agreement superseded the employment agreement releasing appellant of her obligation to repay the \$42,969.80.

Discussion

On review, we resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the judgment. (*Lake v. Reed* (1997) 16 Cal.4th 448, 457.) "Where, as here, no statement of decision was requested or made, [we] must presume that the trial court found every fact necessary to support the judgment, and must affirm the judgment if correct on any ground. [Citation.]" (*Yellen v. Board of Medical Quality Assurance* (1985) 174 Cal.App.3d 1040, 1058.)

DSLE Manual: Draws Against Commissions

Appellant argues that the judgment violates section 34.2 of the California Division of Labor Standards Enforcement (DLSE), Enforcement Policies and Interpretations Manual (DSLE Manual). DLSE is the state agency charged with administering and enforcing California labor statutes and wage order

regulations. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 561-562.)

Section 34.2 of the DLSE Manual is entitled "**Draws Against Commissions**" and states in pertinent part: "If an employee receives a draw against commissions to be earned at a future date, the 'draw' must be equal at least to the minimum wage and overtime due the employee for each pay period (unless the employee is exempt, *i.e.*, primarily engaged in outside sales). Although the draw may be reconciled against earned commissions at an agreed date or when the commission is earned, the draw is considered the basic wage and is due for each period the employee works even though commissions do not equal or exceed the amount of the draws, unless there is a specific agreement to the contrary. (*Agnew v. Cameron* (1967) 247 Cal.App.2d 619; 55 Cal.Rptr. 733.) Advances may only be recovered at termination if there is a specific written agreement to that effect and only to the extent that the advances exceed the minimum wage and overtime requirements."²

Gary Kravetz, CEO of NCC, testified that appellant was paid minimum wage even if she earned no commissions during a pay period. Appellant's final paycheck was for three weeks minimum wages even though no commissions were earned.³ When asked whether the open book account included minimum wages, Kravetz stated that appellant was paid about \$70,000 a year and that

² The DSLE reference to "outside sales" refers to overtime exemptions for outside salespersons who spend more than half their work time away from the employer's place of business selling items or obtaining orders. (See *Ramirez v. Yosemite Water Co., Inc.*, *supra*, 20 Cal.4th at p. 793.)

³ Appellant filed a Labor Board claim for an advance draw on commissions after receiving her last paycheck. On March 25, 2007, appellant dismissed the claim and took a \$3,700 draw on unearned commissions that was added to the spreadsheet balance.

minimum wages for the three year employment period would have been about \$28,000.

Appellant argues that the agreement to pay back unearned commissions violates public policy because it forfeits her right to minimum wages. But that is not what happened. Appellant was paid commissions far in excess of the minimum wage. "[I]t is clearly the law in California that a salesman is required to repay the excess of advances made over commissions earned when there is an express agreement on the part of the salesman to repay such excess [citation]" (*Agnew v. Cameron, supra*, 247 Cal.App.2d at p. 622,)

Accounting Discrepancies

Appellant argues there are discrepancies between the commission balance spreadsheet and the amounts listed on her pay stubs. Appellant states that her pay stubs list gross pay in two parts: "regular rate" at \$6.75 an hour for minimum wage, and commissions advanced less the minimum wage.

Appellant claims that on termination of her employment, NCC may only recover unearned commission advances in excess of the minimum wage. Section 34.2 of the DLSE manual states: "Advances may only be recovered at termination if there is a specific written agreement to that effect and only to the extent that the advances exceed the minimum wage and overtime requirements. [Citation.]"

Appellant signed an "Agreement to Repay Loans Received In Excess of Commissions Earned – Executive Recruiters & Assistants" which stated in pertinent part: "Upon termination, Corp. Acctg. will do a final reconciliation as follows: total compensation paid to recruiter minus either the commission earned and paid or the minimum wage earned for the period of time worked, *whichever is greater*. Any outstanding loan amount will be paid by me to NCC immediately,

unless a payment schedule is arranged and agreeable with NCC." (Emphasis added.)

The trial court did not err in finding that appellant owed \$42,969.80 for unearned commission advances (\$271,824.97), minus commissions and bonuses earned (\$224,025.71 + \$4,829.46). The argument that appellant is entitled to a \$51,840⁴ offset for minimum wages is without merit. Appellant was paid \$224,025.71 in earned commissions, about four times the minimum wage over the 39 month period. Unlike other NCC executive recruiters, appellant requested and received commission advances in excess of the \$19,500 cap specified in the employment agreement.⁵

Severance Agreement

Appellant complains that she has no recollection of initialing the first two pages of the employment agreement and that the original was not produced at trial. The employment agreement was authenticated by Kravetz and the NCC office manager, Jeannine Serbanich. Appellant admitted signing the last page of the agreement. The trial court did not err in overruling appellant's best evidence objection.

Appellant contends that the sale of the business was an unforeseen contingency that relieved her of the obligation to repay the commission advances. SelectRemedy offered to continue her employment, but appellant declined. Appellant consulted an attorney and unsuccessfully tried to negotiate a mutual

⁴ The spreadsheet shows 96 bimonthly pay periods. Assuming appellant worked 80 hours each pay period (i.e., 80 hours every two weeks) for a total of 7,680 hours (96 pay periods x 80 hours), the total minimum wage is \$51,840 (\$6.75 per hour x 7,680 hours).

⁵ Kravetz stated that appellant was allowed to exceed the maximum draw specified in the employment agreement because she had problems with her son and needed the money,

release of her obligation to repay NCC. **(RT 18-19)**~ Having received a \$1,380.50 severance check and another \$3,700 draw on unearned commissions, appellant is estopped from claiming that the employment agreement is unenforceable or relieves her of the obligation to repay the \$42,969.80. (Civ. Code, § 1589.)

Appellants remaining arguments have been considered and merit no further discussion.

The judgment is affirmed. NCC is awarded costs on appeal.

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YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

James W. Brown, Judge
Superior Court County of Santa Barbara

Nancy Lee Spear, in pro per, Appellant.

No appearance for Respondent.